# No. 14,595

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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JOHN P. MITCHELL,
*Appellant,*

v.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
*Appellee.*

## BRIEF FOR APPELLEE.

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FILED
MAR 21 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

## Subject Index


| | Page |
|---|---|
| Jurisdiction | 1 |
| Statement of the Case | 1 |
| Facts | 2 |
| Questions Presented | 3 |
| Statutes and Regulations | 4 |
| Summary of Argument | 7 |
| Argument | 10 |
| I. Even if no oath was administered to the members of the court martial, its proceedings were not invalid | 10 |
| II. The denial of a continuance in appellant's case did not deprive his court martial of jurisdiction | 12 |
| III. Appellant did not exhaust his administrative remedies | 17 |
| IV. The district court was not required to hold a hearing in this case | 18 |
| Conclusion | 20 |

## Table of Authorities Cited

### Cases

Pages

Burns v. Wilson, 346 U.S. 137 ..... 8, 9, 11, 15, 16, 17, 19

Collins v. McDonald, 258 U.S. 416 ..... 10, 14, 17, 19

In re Grimley, 137 U.S. 147 ..... 17

Hiatt v. Brown, 339 U.S. 103 ..... 14, 15

Humphrey v. Smith, 336 U.S. 695 ..... 14

McMahan v. Hunter, 179 F.2d 661 ..... 17

Price v. Johnston, 334 U.S. 266 ..... 19

Spencer v. Hunter, 177 F.2d 370 ..... 17

Swaim v. U. S., 165 U.S. 553 ..... 7, 11

United States v. Ju Toy, 198 U.S. 253 ..... 10, 17, 19

Wade v. Hunter, 336 U.S. 684 ..... 12, 13

Whelchel v. McDonald, 340 U.S. 122 ..... 16

In re Yamashita, 327 U.S. 1 ..... 15

### Statutes

10 United States Code, Section 1490 ..... 4, 10

28 United States Code:

Section 1294(1) ..... 1

Section 2253 ..... 1

Section 2255 ..... 1

### Articles

Article of War 19 ..... 4, 7, 10

Article of War 53 ..... 6, 18

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## BRIEF FOR APPELLEE.

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### JURISDICTION.

Jurisdiction is invoked under Sections 2255, 1294(1) and 2253 of Title 28 United States Code.

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### STATEMENT OF THE CASE.

Appellant filed a petition for a writ of habeas corpus on August 18, 1954, alleging that he was illegally confined by appellee. He contended that he was denied the effective assistance of counsel and that the members of the court which tried him were not sworn. This, he claimed, showed that the General Court Mar-

tial which tried him did not have competent jurisdiction over him or the subject matter on which he was tried.

On September 24, 1954 United States District Judge Edward P. Murphy obtained certified photostatic copies of the Board of Review No. 1, European Theater of Operations, dated 11 October, 1944, in the case of Private John P. Mitchell, the appellant herein. On September 27, 1954 Judge Murphy denied the petition for a writ of habeas corpus on the grounds that an examination of the record revealed the contentions of appellant "to be utterly without merit". Notice of appeal was filed on November 17, 1954 from Judge Murphy's order.

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## FACTS.

Appellant was tried by a General Court Martial convened at Tidworth, Wiltshire, England, in the European Theater of Operations, July 26, 1944 (R. 1).* Appellant was charged with murder, carrying a concealed weapon and absence without leave (R. 2). He was convicted on all counts and dishonorably discharged and sentenced to a term of life imprisonment (R. 2). This term was modified to a sentence of twenty-one years by orders issued on March 8, 1946 and January 9, 1951 (R. 94, 95). The record of the reviewing authorities reveals that "Immediately following the arraignment the defense moved

*The "R" numbers refer to page numbers on the photostatic copy of the record of the Board of Review.

for a continuance 'on the grounds that it has not had time to properly prepare its case. The case has been in its hands less than twenty-four hours.' The prosecution stated that the charges were served on accused 21 July 1944 (five days prior to the convening of the court, as confirmed by the charge sheet), that defense counsel examined the file 'about four days ago' and that trial on 26 July was required by military necessity. The court denied the motion'' (R. 2). This denial was upheld by the reviewing authority on October 11, 1944.

The Review Board found that the evidence at the trial ''shows beyond a reasonable doubt that accused, angered at deceased because of his noise and the fact that he spoke to and was answered by accused's 'girl' in an unknown tongue, forced him outside the public house, stabbed him with the dagger . . . (R. 16).'' The reviewing authority found ''The court was legally constituted and had jurisdiction of the person and the offenses (R. 17).''

No facts were stated in the petition, and it does not appear from the record before the court that application was made to the Judge Advocate General for relief pursuant to Article of War 53.

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## QUESTIONS PRESENTED.

I. If the members of the court martial who tried petitioner were not sworn, would the court martial proceedings be void?

II. Did denying a continuance in appellant's case deprive the court martial of jurisdiction?

III. Did appellant exhaust his administrative remedies?

IV. Did petitioner state sufficient facts to require the trial court to issue an order to show cause or to issue a writ of habeas corpus?

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## STATUTES AND REGULATIONS.

*Article of War 19* (10 U.S.C. 1490).

Section 1490. *OATHS (Article 19).* The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A B, do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or

duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A B, do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In the case of affirmation the closing sentence of adjuration will be omitted. (June 4, 1920, c. 227, subchapter II, Section 1, 41 Stat. 790.)

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*Article of War 53*

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And pro-

vided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49 and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

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## SUMMARY OF ARGUMENT.

I. Even if no Oath was Administered to the Members of the Court Martial, its proceedings were not invalid.

Appellant has not alleged the facts surrounding his claim that the members of the court which tried him were not sworn. More than a mere legal conclusion should be required where, as here, the claim did not appear to be seriously urged by appellant. In any event, however, the Supreme Court in *Swaim v. United States,* 165 U.S. 553, 561, has decided that a failure to administer the oath pursuant to Article of War 19 is a mere error of procedure which is not sufficient to vitiate a court martial. In addition, the Board of Review found that the court martial was properly constituted. This finding should be upheld

in the absence of facts showing the review to be inadequate.

II. The Denial of a Continuance in Appellant's Case did not deprive his Court Martial of Jurisdiction.

The motion for continuance was made while the invasion of France was in operation. The prosecution indicated that military necessity required the trial at that time. The court decided that the defense had four days to prepare its case and that military necessity required the case be tried. On these facts the court martial did not abuse its discretion in denying the motion for continuance.

However, a continuance is a mere matter of procedure, and an error in the denial thereof does not go to the jurisdiction of the court martial. In a military court martial the scope of review is narrower than in civil criminal cases. The law in civil criminal cases cannot be assimilated to that of military habeas corpus cases. In *Burns v. Wilson,* 346 U.S. 137, the petitioner urged that they had been denied the effective representation of counsel. The Supreme Court held, however, that in the absence of any showing that the military review was inadequate, a civil court should decline to inquire into the matter. Since in this case no showing has been made that the military review was inadequate, the court below properly declined to inquire into the matter de novo.

III. Appellant did not exhaust his Administrative Remedies.

In his petition appellant advances the mere conclusion of law that he "exhausted all legal remedies that are available to him as provided by Article 53." It is not alleged that he applied to the Judge Advocate General for relief and that this relief was denied. A court should not assume jurisdiction unless it is affirmatively shown that all administrative remedies have been exhausted. Here, appellant has failed to make a showing that he has exhausted his administrative remedies. His application is therefore premature.

IV. The District Court was not required to hold a Hearing in this case.

Statements declared to be "material factual allegations" by petitioner are mere conclusions of law. A court is not required to hold a hearing or issue an order to show cause upon the mere declaration of a petition that a court was without jurisdiction. The record concerning only substantial claim of error is supplied by appellant in his brief at page 10. Appellant's complaint that the court looked only to the Board of Review decision is without merit since under *Burns v. Wilson,* supra, the question before the court was whether that review was inadequate.

## ARGUMENT.

### I. EVEN IF NO OATH WAS ADMINISTERED TO THE MEMBERS OF THE COURT MARTIAL, ITS PROCEEDINGS WERE NOT INVALID.

Appellant claims that Article of War 19 (10 U.S.C. Section 1490) was violated in his court martial. In consequence of this violation he alleges that the court martial proceedings were void. Article of War 19 provides that oaths should be administered to various persons connected with a court martial proceedings (see statute copied at page 4 of this brief). The petition does not state the facts surrounding the formation of his court martial. A statement is made under "Contentions" that "the members of the Court that tried petitioner were not sworn". Brief reference is made to this contention under what he terms argument and memorandum of law. The allegation is not listed with the statements appellant states are in support of his petition. The allegation is a mere conclusion of law unsupported by reference to specific facts. While technical nicety may not be required of prisoners to petition for writs of habeas corpus, a court may require something more than a mere conclusion put in a petition without apparent relationship to the petition as a whole. See *United States v. Ju Toy,* 198 U.S. 253, 261; *Collins v. McDonald,* 258 U.S. 416.

However, this fact, even if true, would not be sufficient to invalidate the court martial. It relates merely to a matter of procedure and does not go to the basic jurisdiction of the court. The Supreme Court has held in a case where violation of Article of War 19 occurred that a failure to swear officers in

court martials "were merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offence charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts." *Swaim v. United States,* 165 U.S. 553, 561.

This case is in line with the general rule in habeas corpus actions that mere error is not sufficient to invoke a writ of habeas corpus. Habeas corpus is not a substitute for appeal. Only those errors which affect the jurisdiction of the court martial itself may be reviewed in a habeas corpus action. All the officers which composed appellant's court martial had taken oaths to faithfully perform their duties as officers in the United States Army. Part of these duties were serving on court martials. The lack of an oath creates no presumption that they acted in any way irregularly. Appellant has not alleged any impropriety or malfeasance on the part of the court martial members. He has not alleged that they acted in any way not consistent with the truth. He has demonstrated no prejudice from the lack of an oath even if the facts would disclose that an oath was not given.

Furthermore, the reviewing authority, which is familiar with Army court martial proceedings, found that the court martial was regularly constituted. This finding should be presumed correct in the absence of a more explicit assertion by appellant.

See:

*Burns v. Wilson,* infra.

## II. THE DENIAL OF A CONTINUANCE IN APPELLANT'S CASE DID NOT DEPRIVE HIS COURT MARTIAL OF JURISDICTION.

At the trial of appellant the counsel for the defense made a motion for a continuance. This motion was denied after counsel for the prosecution informed the court that soon "after the defendant was served with the charges some five days prior to trial counsel for the defense had an opportunity to examine the file." According to the record of the trial quoted at page 10 of appellant's brief, prosecution counsel declared that defense counsel "read file over about four days ago". Counsel for the prosecution stated to the court "This case is being tried today because of the fact that there is a military necessity in existence. If it does not try the case today there is a possibility of its never being tried (Appellant's Brief, Page 10)."

This court may take judicial notice of the fact that in June of 1944 France was invaded. The court martial that tried appellant was convened in July while the success of the invasion was still in doubt. England was a debarkation center for those who were going to the front. The remarks of the prosecuting attorney become clear in this setting. The prosecution was informing the court that if the court martial did not take place at that time, the witnesses necessary to prove the prosecution's charges might never be available again. The situation of this case is very similar to that in *Wade v. Hunter,* 336 U.S. 684, where during a court martial the Commanding General withdrew the charges and continued its case to a later date and convened another court martial. In that case the

reason for this action was that "due to the tactical situation the distance to the residences of . . . witnesses has become so great that the case cannot be completed within a reasonable time." As against a claim of double jeopardy, the Supreme Court denied a writ of habeas corpus. The court declared "Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions" (Page 692). The court further declared that "courts should not attempt to review a decision on a tactical situation by the military in the absence of a showing of bad faith". *Wade v. Hunter,* supra.

The present case involves the exercise of discretion by a court martial faced with the urgency of an invasion. The granting of a continuance normally is within the discretion of the trial tribunal. The trial judge is usually in the best position to weigh the necessities of the defendant against the exigencies of the trial situation. In this case the court martial decided that the interests of justice required a trial, even at some inconvenience to the accused, where the possibility existed that if the case was continued it would never be tried. Appellant argues this case on the basis that the defense had only 24 hours to prepare for its case. However, all inferences must be indulged in to support a verdict. The record, as supplied by appellant, reveals that there was a disputed issue of fact with respect to the time the defense had to prepare its case. The prosecution attorney declared that defense counsel had the file four days

before trial. It must be assumed that the court martial resolved this conflict of fact in favor of the prosecution. The case before this court is not one of a defense prepared within 24 hours but one in which the defense had fours days to prepare. It must also be assumed that the court martial found that a military necessity in fact existed which required the case to be tried then or not at all. Assuming that the defense had four days to prepare and that the trial could only be tried that day, it is difficult to see how the court abused its discretion in making the decision it did.

However, in a military habeas corpus case something more is required than mere abuse of discretion to give a civil court jurisdiction to review. It has been held that review in a military habeas corpus case does not extend "to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel." *Hiatt v. Brown,* 339 U.S. 103, 110. Errors in the reception of evidence are not reviewable by civil courts. *Collins v. McDonald, supra.* The lack of a mandatory pre-trial investigation does not go to the jurisdiction of a court martial so to be grounds for the issuance of a writ of habeas corpus. *Humphrey v. Smith,* 336 U.S. 695. The civil courts do not have supervisory or correcting power over the proceedings of a court martial. "The correction of any errors it may have committed is for the military authorities

which are alone authorized to review its decision." *Hiatt v. Brown,* supra, page 111.

See also:

*In re Yamashita,* 327 U.S. 1, 8-9.

The majority of cases cited by appellant have to do with the lack of effective representation by counsel in civil criminal proceedings. "But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt v. Brown,* 339 U.S. 103 (1950). Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis;* it must be so, because of the peculiar relationship between the civil and military law." *Burns v. Wilson,* 346 U.S. 137, 139-140.

In the *Burns* case petitioners asserted that they had been denied due process of law by illegal detention, coerced confessions, denial of counsel of their choice and *the denial of effective representation of counsel.* The Supreme Court held, however, that absence of any showing that the military review was legally inadequate to resolve these claims that "due regard for the limitations on a civil court's power" precludes review by the civil authorities.

In the present case no attempt was made by appellant to show that his military review was inadequate. As a matter of fact, no showing was made that all the review provided by the military was even requested.

In this case it appears that the question of the continuance was argued before the Board of Review and that the Board of Review decided adversely to appellant. "It is the limited function of the civil courts to determine whether the military have given fair consideration" to claims made. *Burns v. Wilson*, supra, at page 144.

See also:

*Whelchel v. McDonald,* 340 U.S. 122.

It appears to us that the *Burns* case is determinative of this appeal. Appellant's only substantial argument is that he was denied the effective representation of counsel because counsel did not have opportunity to prepare his case. In the *Burns* case the lack of effective representation by counsel was urged on the court but the court refused to go into the question. Judge Murphy examined the records of the reviewing authority and found that review was adequate. There are no facts in the record which could cause this Court to reach a contrary decision. No argument is even made of any impropriety or inadequacy in the review procedure. Judge Murphy was, therefore, correct in declining to examine the merits of appellant's contentions de novo.

In the present case it is our opinion that the court martial correctly denied a continuance. On the facts, we do not believe that even on appeal the court's action could be considered an abuse of discretion. But even assuming that an abuse of discretion existed, the granting of a continuance is merely a matter of pro-

cedure which would not go to the jurisdiction of the court, and hence is not reviewable. *In re Grimley,* 137 U.S. 147, 150. But since no contention has been made that the military review was inadequate, the court has no power to inquire into the merits of this case at all. *Burns v. Wilson,* supra.

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### III. APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

In his petition appellant declared that he has "exhausted all legal remedies that are available to him as provided by Article 53." This, however, is a mere allegation of law unsupported by reference to specific facts. To require a court to assume jurisdiction on a mere conclusion of law is improper. *Collins v. McDonald,* supra, at pages 420-421; *United States v. Ju Toy,* 198 U.S. 253, 261.

No facts are alleged which would indicate that application for review had been made under Article of War 53. Without exhausting his remedies under Article of War 53, appellant has no right to raise any questions in federal district court. *McMahan v. Hunter,* 179 F. 2d 661, 663; *Spencer v. Hunter,* 177 F. 2d 370. Without any facts showing that appellant has taken advantage of the Article, the district court could not assume jurisdiction. Technical nicety is not required but facts are. Conclusions will not suffice. Here appellant has failed to allege that he has applied to the judge advocate general for a new trial or to

vacate his sentence as provided for in Article of War 53.

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### IV. THE DISTRICT COURT WAS NOT REQUIRED TO HOLD A HEARING IN THIS CASE.

Appellant argues that the facts alleged on the face of the petition, if not controverted, require the issuance of the writ. Cases are cited which declare that if not controverted, material factual allegation must be accepted as true and, if sufficient, a hearing held or the prisoner released. At page 7 of his brief he mentions three "facts" which he says bound the court to "either issue an order to show cause or issue the writ." These "facts" are "the General Court-Martial was without jurisdiction over appellant or the subject matter; that appellant was denied effective assistance of counsel and that he was denied an opportunity to prepare his defense".

We must respectfully question that these statements are facts. They are legal conclusions. A court is not required to issue an order to show cause upon a mere declaration of a petitioner that a court was without jurisdiction over him. The petitioner must do something more. He must show facts which, if true, would demonstrate lack of jurisdiction. Denial of effective assistance of counsel is a mere legal conclusion. Facts must be shown to demonstrate that such was the case. The denial of an opportunity to prepare a defense is merely another legal conclusion. Facts must be shown to demonstrate that such is the case. More than alle-

gations of law, unsupported by reference to specific facts, must be alleged before any issue is raised which required the introduction of evidence. *United States v. Ju Toy,* supra; *Collins v. McDonald,* supra; *Price v. Johnston,* 334 U.S. 266, 286.

Appellant complains that the court looked to the records of the Board of Review, but this was exactly what the Supreme Court in *Burns v. Wilson* declared that the trial court should do. The question before the court according to the *Burns* case was whether the military review was inadequate. The only documents which would bear on this question were those which revealed the extent of review in petitioner's case.

The documents in this case revealed that appellant raised the question of the denial of a continuance and that the military authorities decided adversely to him. No showing having been made that the military review was inadequate, the court properly decided that he had no jurisdiction to inquire into the matter. *Burns v. Wilson,* supra.

Furthermore, this court presently has before it the only record which is important in this case; that is the record of the motion for a continuance (Appellant's Brief, p. 10). All the facts that are necessary for the decision of this case on any theory are present before the Court of Appeals. The case, therefore, should be decided on its merits.

## CONCLUSION.

We respectfully urge that appellant has shown no grounds for the issuance of a writ of habeas corpus. The decision of the court below should be affirmed and, if treated as an original petition, the petition for a writ of habeas corpus should be denied.

Dated, San Francisco, California,
March 21, 1955.

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